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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1970

No. 336

LOUIS S. NELSON, Warden, California State Prison at San Quentin,
Petitioner,

vs.

JOE J. B. O'NEIL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, issued January 26, 1970, is reported at 422 F.2d 319 (1970), and is also included in the Appendix at pp. 111-26. The opinion of the United States District Court for the Northern District of California, issued July 12, 1968, is unreported and is included in the Appendix at pp. 103-07.

JURISDICTION

On January 26, 1970, the United States Court of Appeals for the Ninth Circuit affirmed the order of the United States District Court for the Northern District of California granting Joe J. B. O'Neil's petition for a writ of habeas corpus and ordering him released from state custody. A petition for rehearing was denied, with one judge dissenting, on April 23, 1970. This Court granted certiorari on November 9, 1970.

QUESTIONS PRESENTED

1. Whether *Bruton v. United States,* 391 U.S. 123 (1968), is violated when a confessing codefendant testifies on the stand, but denies making the statement implicating his codefendant.

2. Whether, under the circumstances of this case, admission of the codefendant's confession was harmful.

3. Whether the doctrine of comity between federal and state jurisdictions and the burden of habeas corpus petitions upon the federal judiciary oblige a federal district court to require a state prisoner to exhaust state remedies made available by newly announced constitutional standards.

STATUTE INVOLVED

The case involves Title 28, United States Code, Section 2254(b), which provides:

> "An application for a writ of habeas corpus in behalf of a person in state custody pursuant to the judgment of a state court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an abuse of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner."

STATEMENT OF THE CASE

A. Proceedings in the State Courts

Joe J. B. O'Neil, the petitioner for a writ of habeas corpus below and the respondent herein, was sentenced to state prison by the Los Angeles County Superior Court on July 17, 1965, after a jury had found him guilty of kidnapping for purposes of robbery, robbery in the first degree, and vehicle theft. He appealed to the California Court of Appeal, Second Appellate District, which affirmed his conviction in an opinion filed on March 30, 1967 (certified for non-publication). A petition for rehearing was denied on April 26, 1967. He did not file a petition for hearing with the California Supreme Court. An application to recall the remittitur was denied by the California Court of Appeal on February 7, 1967.

O'Neil filed a petition for a writ of habeas corpus with the California Supreme Court on March 7, 1968,

which was denied without written opinion on March 20, 1968.

B. Proceedings in the Federal Courts

On April 25, 1968, O'Neil filed an application for a writ of habeas corpus in the United States District Court for the Northern District of California. An order to show cause was issued and petitioner filed a return thereto on May 17, 1968. A supplemental return was filed on June 10, 1968, and a second supplemental return was filed on June 13, 1968.[1] O'Neil's traverse was filed on June 21, 1968.

On July 12, 1968, the District Court granted the writ and ordered O'Neil discharged from custody. It also provided that execution thereof was to be stayed ten days to permit filing by petitioner of a notice of appeal and, in the event an appeal was taken, custody was not to be disturbed until further order of the court. On the merits of the case, the District Court concluded that there was harmful *Bruton* error.

Petitioner's notice of appeal was filed on July 22, 1968, and a certificate of probable cause was issued the same day.

On January 26, 1970, a panel of the United States Court of Appeals for the Ninth Circuit, with one judge dissenting, affirmed the order of the District Court. A petition for rehearing, received one day late, was ordered filed but on April 23, 1970, the petition

[1]The first supplement became necessary when this Court overruled *Delli Paoli* in *Bruton v. United States*, 391 U.S. 123 (1968); the second became necessary when, in *Roberts v. Russell*, 392 U.S. 293 (1968), this Court held the *Bruton* rule fully retroactive.

was denied with one judge dissenting. The Ninth Circuit held that there was *Bruton* error because there could be no "meaningful" cross-examination of the respondent's codefendant, and that this error was harmful. It also determined that O'Neil was not obliged to exhaust state remedies.

STATEMENT OF FACTS

On February 8, 1965, at approximately 10:30 p.m., Mr. Vance Collins was seated in his 1956 two-door, white Cadillac which was parked in the lot of a supermarket located at 3993 South Western Avenue in the City of Los Angeles. He was awaiting his wife's return from grocery shopping. (RT 10-12.)[2]

Respondent O'Neil approached the passenger door of the Collins' automobile, opened it, and got in. Respondent had a silver-plated gun and was pointing it at Mr. Collins. Respondent told him, "There is a fellow on your other side. Would you let him in?" The driver's side of the door was opened, and Mr. Collins leaned forward to let the second man in. The second man, respondent's codefendant Runnels, sat down in the rear seat. (RT 12-15.)

Respondent told Mr. Collins to back the car out of the lot. Mr. Collins, in fear, did as he was told. Respondent continued to give him directions. As the

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[2]As hereinafter used, "RT" refers to the reporter's transcript of respondent's state trial which was lodged with the District Court below, was before the Court of Appeals, and is part of the record herein.

victim drove, respondent told him that he "might get hurt real bad" if he didn't have money. Respondent ordered Mr. Collins to hand over his wallet. Eight dollars was taken, and Runnels returned the wallet to him. (RT 16, 18-20.)

Approximately three and one-half blocks from the market, respondent ordered the victim to stop and exit from the car. Respondent still had the gun pointed at him. Respondent ordered Mr. Collins to walk to the rear of the car and then to cross the street. Runnels got out of the back seat and stood beside the vehicle for some time. Runnels then got into the driver's seat and drove away with O'Neil. Mr. Collins returned to the market and notified the police. (RT 17, 22-24, 42-43, 60.)

Approximately 1:00 a.m., February 9, 1965, a police patrol unit received a radio message that a white automobile with two male Negro occupants was suspiciously circling a liquor store. The officers drove to the liquor store and talked to the manager. The manager told the officers that the white vehicle was first pointed out to him by a customer. The manager then observed the vehicle circle the block two or three times. These circumstances caused the manager to become apprehensive and telephone the police. (RT 63, 67-68, 72, 89.)

At this point, one of the officers saw a white car with two male Negroes approaching in an alley near the liquor store. The vehicle was going slowly, and the manager said, "That is the vehicle." The automobile was a 1956 white Cadillac. (RT 69, 70, 75.)

Officers began following the Cadillac. O'Neil was the passenger and Runnels was the driver. During the pursuit, O'Neil was observed to throw what appeared to be a shiny revolver from the car. Officers, with the red light and siren, stopped the suspects. On the basis of the radio call and the weapon, both occupants were taken into custody on suspicion of armed robbery when they alighted from the vehicle. Officers returned to the location where the object landed and retrieved a silver-plated .22 caliber revolver which was loaded with four bullets. (RT 63-66, 71, 75, 78-80.)

O'Neil and Runnels were taken to the Culver City Police station and the Cadillac was impounded. Approximately 4:00 p.m., February 9, 1965, they were formally arrested by Los Angeles Police officers and were taken to the University Police station. On the evening of February 9, 1965, Mr. Collins went to the University Police station. He was told that the thieves may have been apprehended. Mr. Collins was asked to view a police lineup and he positively identified O'Neil and Runnels from the lineup. (RT 26-27, 34-35, 48, 80, 96.)

The next day, February 10, 1965, at approximately 10:20 a.m., Officer Traphagen had a conversation with Runnels. Runnels was advised that he did not have to say anything; that anything he said might be used in a later criminal prosecution; and that he had a right to an attorney. There was no coercion nor were there any promises of immunity. Runnels proceeded to make a complete confession implicating O'Neil. The court admitted the confession with an admoni-

tion to the jury that it was not to be considered against O'Neil.[3] (R'T 92-93, 102-05; App. at 128-29, 137-40.)

The Defense

The mother and sister of O'Neil testified that he and Runnels came to the O'Neil home at approximately 9:00 p.m. on February 8, 1965. They departed shortly after 11:00 of that same evening. The mother also testified that after her son's arrest, she was told by Mr. Collins that he was unsure of the identification. (R'T 162-63, 167, 175-77.)

Mr. Lee Brooks testified that on February 8, 1965, at approximately midnight, he observed O'Neil and Runnels sitting in a big white car near 61st Street and Vermont Avenue in the City of Los Angeles. An unknown man approached the car and began conversing with them. The man handed what appeared to be keys to one of them. Runnels got into the driver's seat and drove off with O'Neil. (R'T 145-47, 149-52, 157.)

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[3]The trial judge gave limiting instructions when the confession was actually introduced (RT 102; App. at 137) and gave the following standard instructions before the jury retired:

"Where evidence has been received against one of the defendants but is not received as against the other, the jury may consider such evidence only as against the defendant against whom it was permitted to be received. It may not be considered by the jury for any other purpose, or against any other defendant.

"Where evidence has been received of a statement by one of the defendants after his arrest and in the absence of his co-defendant, such statement can be considered only as evidence against the defendant who made such statement and cannot be considered for any purpose as evidence against his co-defendant." (App. at 245-46.)

Runnels testified that he was with O'Neil on the afternoon and evening of February 8, 1965. Runnels stated that he and O'Neil left the O'Neil household approximately 11:00 p.m. While sitting at a bus stop around midnight, they obtained a ride from a person known as "Gary". Gary was driving a white 1956 Cadillac. He drove them to a night club and went inside. They remained seated in Gary's automobile. Shortly thereafter, Gary returned to the car and began conversing with O'Neil. Approximately 12:20 a.m., February 9, 1965, Gary gave the keys to O'Neil. O'Neil was directed to bring the car back to the night club around 2:00 a.m. (RT 181, 185-89, 200, 207; App. at 143-47, 156, 162.)

Since O'Neil did not have a driver's license, Runnels drove. They headed for Santa Monica, but on the way O'Neil discovered a gun in the glove compartment. They drove around the block and into an alley to find a place to throw the gun. O'Neil threw the gun out of the window. At this point, they were stopped and arrested by police, Runnels denied making any statement to police officers. (RT 189-92, 211, 213; App. at 147-50, 165-67.)

Miss Mildred Manchester, the common law wife of Runnels, testified that she talked with Officer Traphagen on the morning of February 11, 1965. She was informed that the officer would see that Runnels got a life sentence if no statement was made as opposed to a lesser sentence if the statement was forthcoming. She was asked to see what could be done. Later that day, Miss Manchester received a telephone call from

Runnels, and she relayed the officer's message. Runnels informed her that he was not going to make a statement. (RT 137-38, 140, 143.)

O'Neil testified that he spent the evening of February 8, 1965, in the company of Runnels. His version of the facts paralleled the story told by Runnels. In addition, O'Neil was able to identify "Gary" as James Garret. O'Neil admitted knowing the residence of Garret, but on cross-examination indicated that no attempt was made to subpoena him. (RT 217, 220, 238.)

SUMMARY OF ARGUMENT

The Court of Appeals concluded that when the statement of a codefendant implicates another, nonconfessing codefendant, and the confessing codefendant takes the stand and testifies, then the right of confrontation is satisfied only if he *admits* making the statement, but is not satisfied if he *denies* making it. Yet, *Douglas v. Alabama,* 380 U.S. 415 (1965), and other opinions of this Court demonstrate that the right of confrontation is satisfied if there is *opportunity* to cross-examine. This opportunity exists regardless of whether the codefendant admits or denies the statement, for in either case he may be asked about the content of the statement itself.

In the present case, meaningful cross-examination was possible and in fact accomplished, albeit by the prosecution. There is no reason why O'Neil himself could not have made the same inquiry. Furthermore,

the most successful cross-examiner could not hope for a better result; the denial that the statement was made and the testimony favoring O'Neil. Thus the Court of Appeals erred in concluding that meaningful cross-examination was not possible.

In any event, the admission of the statement was harmless. First, under *California v. Green,* 395 U.S. 149 (1970), the statement was admissible as substantive evidence against O'Neil. Secondly, admission of the statement did not have a devastating impact upon O'Neil's defense because the other evidence was overwhelming, and because the statement itself did not attempt to shift the blame or serve as the only evidence connecting O'Neil with the crime. Runnels also denied confessing and gave testimony supporting O'Neil's defense, O'Neil was afforded the opportunity to cross-examine Runnels, and limiting instructions were given.

Lastly, petitioner suggests that it was wholly inappropriate for the District Court to decide the *Bruton* question since the state courts had not been given an opportunity to consider the issue.

ARGUMENT

I

THE SIXTH AMENDMENT RIGHT TO CONFRONTATION IS SATISFIED IF THERE IS AN OPPORTUNITY TO CROSS-EXAMINE.

Citing *Douglas v. Alabama*, 380 U.S. 415 (1965), *Bruton v. United States*, 391 U.S. 123 (1968), and *Townsend v. Henderson*, 405 F.2d 324 (6th Cir. 1968), the majority opinion below concluded that O'Neil was denied the right of confrontation because Runnels denied making the confession implicating O'Neil and thereby precluded effective cross-examination. *O'Neil v. Nelson, supra*, at 321 (App. at 114-15). The majority misconstrued *Douglas*, misinterpreted *Bruton*, and both misconceived and failed to examine the options available under the right of confrontation.

As a panel of the Sixth Circuit did in *Townsend v. Henderson, supra*, at 329, the majority seized upon fortuitous language found in *Douglas*, and quoted in *Bruton*, for the proposition that only if the confessing codefendant *admits* making the statement (here, Runnels denied making it) can the accused have effective cross-examination, *O'Neil v. Nelson, supra*, at 321 (App. at 114):

> "[E]ffective confrontation of Loyd [the codefendant] was possible only if Loyd affirmed the statement as his. Loyd did not do so but relied on his privilege to refuse to answer." *Douglas v. Alabama, supra*, at 420, quoted in *Bruton v. United States*, at 127.

Yet when this Court in *Douglas* noted that "effective confrontation of Loyd was possible only if Loyd

affirmed the statement as his," the Court was merely stating that cross-examination was impossible where a codefendant stood fast on his right against self-incrimination and thus did not testify at all. Obviously, as long as Loyd invoked his fifth amendment right, he could not be cross-examined, whereas if he waived that right and testified, then he could be fully cross-examined. That this is indeed the proper interpretation of *Douglas* is suggested by *California v. Green*, 399 U.S. 149, 162-63 (1970), in which this Court stated:

> "[I]n *Douglas v. Alabama*, . . . the defendant's supposed accomplice, Loyd, . . . refused to testify on self-incrimination grounds. The confrontation problem arose precisely because Loyd could not be cross-examined as to his prior statement; had such cross-examination taken place, the opinion strongly suggests that the confrontation problem would have been nonexistent. . . ."

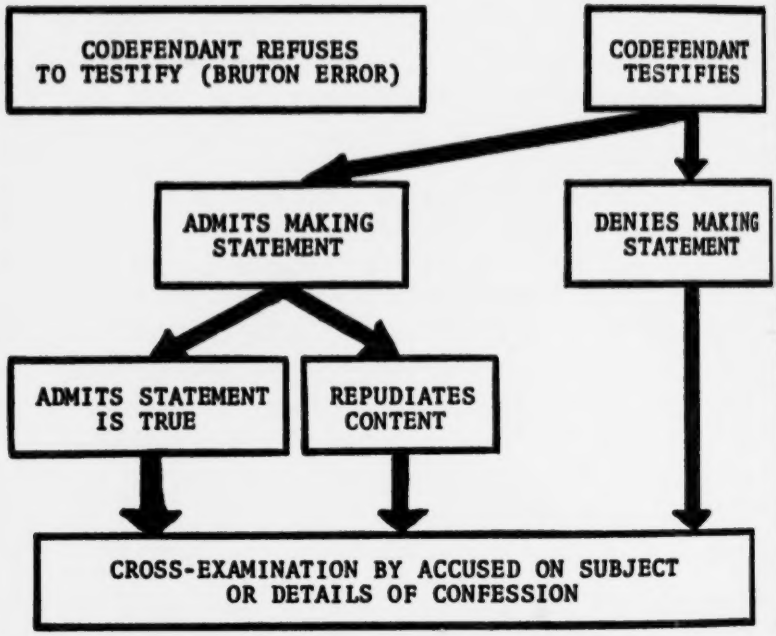
The same language from *Douglas* was quoted in *Bruton* because a similar conflict between fifth and sixth amendment rights was involved. But as this Court observed in *California v. Green*, "No confrontation problem would have existed if Bruton had been able to cross-examine his co-defendant." *Id.* at 163 (footnote omitted).

Neither *Douglas* nor *Bruton* stands for the proposition that if the codefendant takes the stand, but denies rather than admits making the statement, an accused is deprived of an opportunity to subject his codefendant to effective cross-examination. This becomes patently clear when the options available to

the accused are examined. As illustrated in Figure A, below, there are only a few possible avenues of cross-examination available when the confession of a codefendant is introduced at trial:

Figure A

OPTIONS AVAILABLE TO CROSS-EXAMINE CONFESSING CODEFENDANT



If the codefendant does not take the stand *(Bruton)*, or if he is called but refuses to testify *(Douglas)* then

the accused cannot cross-examine him. However, if the codefendant testifies, he either admits or denies making the statement. If he admits making the statement, he either admits that the statement is true or repudiates its content and testifies that the statement is false. But if the codefendant testifies, regardless of whether he admits or denies making the statement, he is always subject to cross-examination by the accused upon the subject or details of the confession. Whether the codefendant admits or denies making the statement, insofar as the accused's right of confrontation is concerned, the result is always the same. In its most recent opinion on this subject, which declined to follow its 1968 decision in *Townsend v. Henderson, supra,* the Sixth Circuit held:

> "A defendant is not denied his Sixth Amendment right to confrontation when a codefendant's incriminating statement, which implicates the defendant, is used against the codefendant during trial if subsequently the codefendant takes the stand in his own behalf. *The right to confrontation would then exist for the defendant regardless of whether the codefendant denies or admits making all or part of the incriminating and implicating statement." United States v. Sims,* 430 F.2d 1089, 1091 (6th Cir. 1970) (emphasis added).

When that portion of the *Douglas* opinion upon which the Ninth Circuit relied is taken in context, *Douglas* supports the above proposition. In *Douglas,* this Court observed:

> "In the circumstances of this case, petitioner's inability to cross-examine Loyd as to the alleged

> confession plainly denied him the right to cross-examination secured by the Confrontation Clause. . . . Although the Solicitor's reading of Loyd's alleged statement and Loyd's refusals to answer, were not technically testimony, the Solicitor's reading may well have been the equivalent in the jury's mind of testimony that Loyd in fact made the statement; and Loyd's reliance upon the privilege created a situation in which the jury might improperly infer both that the statement had been made and that it was true. . . . Since the Solicitor was not a witness, the inference from his reading that Loyd made the statement could not be tested by cross-examination. Similarly, Loyd could not be cross-examined on a statement imputed to him but not admitted by him. Nor was the opportunity to cross-examine the law enforcement officers adequate. . . . [S]ince their evidence tended to show only that Loyd made the confession, cross-examination of them as to its genuineness could not substitute for cross-examination of Loyd to test the truth of the statement itself." *Douglas v. Alabama,* 380 U.S. 415, 419-20 (1965), partially quoted in *Bruton v. United States,* 391 U.S. 123, 127 (1968).

The defect in *Douglas* arose because Loyd's invocation of his right against self-incrimination precluded any cross-examination. Therefore Douglas could not cross-examine Loyd as to whether "[1] the statement had been made and that [2] it was true." See also *Bruton v. United States,* 391 U.S. 123, 127 (1968). Even if the police officers could be examined as to whether the statement had been made, Loyd could still not be cross-examined "to test the truth of the statement

itself." Thus, what *Douglas* really demonstrates is that there are always two possible questions which can be asked on cross-examination of any codefendant who takes the stand: (1) Did you make the statement [Yes? No?]; and (2) Is the content of that statement true? See *California v. Green*, 399 U.S. 149, 158-59 (1970).

It is obvious that the availability of cross-examination into the substance of the statement does not depend upon whether the codefendant admits making the statement, for even if he does not, the accused may still inquire into the facts contained in the purported confession; "the truth of the statement itself." Therefore the availability and scope of inquiry remains the same.

That this type of cross-examination was possible in this case need not be the subject of speculation, for such inquiry was actually had, albeit by the prosecution and counsel for Runnels. For example, the prosecutor inquired as to whether Runnels had made the statement at all:

"Q. No do you remember talking to Officer Traphagen?
A. Remember talking to him?
Q. Yes, about this case?
A. Ain't talked to him about no case, no.
Q. Didn't you ever talk to him about the case?
A. No, I didn't talk to him about the case.
Q. Did he talk to you about the case?
A. Yeah, he talked to me about it.
Q. Did he ask you any questions about your whereabouts that night?
A. Yes, he asked me.

Q. Did he ask you whether or not you had robbed this man, Mr. Collins?

A. Yes, he asked me that.

Q. Did he ask you whether or not you had taken his car?

A. He asked me that.

Q. Did he ask you what you were doing down in Culver City.

A. Yes.

Q. Did you tell him that you had met O'Neil earlier that night and talked about committing some robberies?

A. I didn't tell him anything. I told him I had no comment to make.

Q. Didn't you tell him that you went down to the Better Food Market?

A. Well, after he told me whatever I said would be held against me, and I could wait to talk to a lawyer, I decided I would wait to talk to a lawyer, and I didn't make no statement.

Q. None whatsoever?

A. That's right." (RT 210:9-211:16; App. at 164-65.)

"Q. Didn't you tell Officer Traphagen you went into the liquor store?

A. I told you I made no statement to Mr. Traphagen.

Q. You refused to talk to him?

A. That's right.

Q. Everything Officer Traphagen said you told him, he is either mistaken or lying?

A. One of the two he is doing." (RT 213:4-12; App. at 166-67.)

On direct examination, Runnels denied making the statement. (RT 192:12-18; App. at 150.) He also denied its substance.

"Q. Had you committed this robbery?
A. No." (RT 192:10-11; App. at 149.)

Douglas requires that the accused be afforded an opportunity to cross-examine the confessing codefendant as to (1) whether he made the statement, and (2) the content of the statement. Such inquiry was made by both Runnels' attorney and the prosecution, and is similar to that found to remove any possibility of *Bruton* error in another Ninth Circuit case, *Santoro v. United States,* 402 F.2d 920, 922-23 (9th Cir. 1968). There is, as suggested in *Parker v. United States,* 404 F.2d 1193, 1196-97 (9th Cir. 1968), no reason why O'Neil could not have done so too. And furthermore, as the Seventh Circuit observed in *Trigg v. United States,* 430 F.2d 372, 375 (7th Cir. 1970), the defendant's "failure to examine his codefendant was the product of his own inaction and not the result of governmental improprieties." See also *United States v. Catino,* 403 F.2d 491, 496 (2d Cir. 1968).

The availability of cross-examination does not turn on whether the codefendant admits or denies the statement. *United States v. Sims,* 430 F.2d 1089, 1091 (6th Cir. 1970); *cf. California v. Green,* 399 U.S. 149, 158-59 (1970). Actually O'Neil could not have hoped for a greater benefit from cross-examination than when Runnels denied making the confession. As the dissenting opinion in the court below states:

> "In either case, O'Neil would be privileged to cross-examine Runnels. The best O'Neil could hope for would be for Runnels to testify that the confession was false and that O'Neil did not commit the crimes. Here, Runnels gave O'Neil

> all that and more. He denied that he confessed and said that O'Neil was not at the scene of the crimes." *O'Neil v. Nelson, supra,* at 325 (App. at 125).

The Fifth Circuit made the same analysis: that the confessing codefendant gives the defendant the maximum benefit of cross-examination when he denies making the statement. *Baker v. Wainwright,* 422 F.2d 145, 148 (5th Cir. 1970). And in *California v. Green,* 399 U.S. 149, 159 (1970), this Court suggested the same conclusion:

> "The most successful cross-examination at the time the prior statement was made could hardly hope to accomplish more than has already been accomplished by the fact that the witness is now telling a different, inconsistent story, and—in this case—one that is favorable to the defendant."

The opinion of the Ninth Circuit herein, and of other courts reaching the same result,[4] rather than

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[4]The Ninth Circuit is not the only court which has at one time, with at least one panel of judges, decided that where the codefendant denies making the statement then there can be no meaningful cross-examination. In *West v. Henderson,* 409 F.2d 95, 97 (6th Cir. 1969), and *Townsend v. Henderson,* 405 F.2d 324, 329 (6th Cir. 1969), several panels of the Sixth Circuit reached this conclusion. However, in *United States v. Sims,* 430 F.2d 1089, 1091 (6th Cir. 1970), after referring to *West* and *Townsend* as an inconsistent line of cases, the Sixth Circuit specifically held that the right of confrontation did not depend upon whether the statement was admitted or denied. But *Sims* did not overrule either *West* or *Townsend.* In a somewhat similar vein is *United States v. Guajardo-Melendez,* 401 F.2d 35, 38-39 (7th Cir. 1968), in which a panel of the Seventh Circuit held that where an agent testified as to a confession by Hernandez implicating Guajardo-Melendez, and Hernandez testified (he was not cross-examined, however), there was error. The court therein held that the *Bruton* rationale did not strictly apply and gave no specific basis for the decision. *Ibid.* However, it would appear

underscoring the role of cross-examination seems to belittle it. In *California v. Green*, 399 U.S. 149, 158-59 (1970), this Court emphasized the function of confrontation in testing the credibility of extrajudicial statements—if not the availability of cross-examination when the statement is denied:

> "Confronation: (1) insures that the witness will give his statements under oath—thus impressing him with the seriousness of the matter and guarding against the lie by the possibility of a penalty for perjury; (2) forces the witness to submit to cross-examination, the 'greatest legal engine ever invented for discovering the truth'; (3) permits the jury that is to decide the defendant's fate to

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that *Guajardo-Melendez* was considered by the court to be more a case of prosecutorial misconduct than *Bruton* error. See *id.* at 39. Yet *Guajardo-Melendez*, insofar as it turns on *Bruton*, seems inconsistent with the subsequent decision in *Trigg v. United States*, 430 F.2d 372 (7th Cir. 1970). In that case statements of Burris were related by Turnbou in rebuttal to Burris' testimony. No *Bruton* error was found since Trigg could have called Burris back to the stand for further examination. *Id.* at 374-75. *Guajardo-Melendez* was held inapplicable since the incriminating statements were either neutral or necessary to prove Burris' illegal intent, *id.* at 375, thus supporting our conclusion that *Guajardo-Melendez* was not really a *Bruton* case at all. One other case also deserves mention. In *United States v. Bujese*, 378 F.2d 719 (2d Cir. 1967), a codefendant took the stand and denied guilt, but on cross-examination, when confronted with a confession implicating Bujese, confessed. However, the codefendant testified that insofar as his statement implicated Bujese, it was incorrect; Bujese had refused to take part in the crime. The Second Circuit initially affirmed the conviction, but this Court vacated and remanded for reconsideration in light of *Bruton*, 392 U.S. 297 (1968). On remand, the case was reversed without discussion of the *Bruton* aspect. *United States v. Bujese*, 405 F.2d 888, 889 (2d Cir. 1969). *Bujese*, however, cannot be reconciled with a later Second Circuit case, *United States v. Insana*, 423 F.2d 1165 (2d Cir. 1970). In that one, Schurman had made extrajudicial statements implicating Insana, but took the stand and claimed he could not remember. Without mentioning *Bujese*, the court therein held that there was no *Bruton* error. *Id.* at 1168.

observe the demeanor of the witness in making his statement, thus aiding the jury in assessing his credibility.

"It is, of course, true that the out-of-court statement may have been made under circumstances subject to none of these protections. But if the declarant is present and testifying at trial, the out-of-court statement for all practical purposes regains most of the lost protections. If the witness admits the prior statement is his, or if there is other evidence to show the statement is his, the danger of faulty reproduction is negligible and the jury can be confident that it has before it two conflicting statements by the same witness. Thus, as far as the oath is concerned, the witness must now affirm, *deny,* or qualify the truth of the prior statement under the penalty of perjury. . . ." (Emphasis added.)

It is obvious from *Bruton v. United States,* 391 U.S. 123, 128, 132, 136 (1968), and *Harrington v. California,* 395 U.S. 250, 252-53 (1969), that if the accused is given the *opportunity* to cross-examine, the sixth amendment right of confrontation has been satisfied. This seems to be the view of the various other courts of appeals.[5] Even five other panels of

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[5]*United States v. Sims,* 430 F.2d 1089, 1091 (6th Cir. 1970); *Trigg v. United States,* 430 F.2d 372, 374-75 (7th Cir. 1970); *United States v. Insana,* 423 F.2d 1165, 1168 (2d Cir. 1970); *Baker v. Wainwright,* 422 F.2d 145, 147-48 (5th Cir. 1970); *United States v. Cale,* 418 F.2d 897, 899 (6th Cir. 1969); *United States v. Weston,* 417 F.2d 181, 187 (4th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); *United States v. Marine,* 413 F.2d 214, 217-18 (7th Cir. 1969); *United States v. Catino,* 403 F.2d 491, 496 (2d Cir. 1968); see *United States ex rel. Cheeks v. Russell,* 424 F.2d 647 (3d Cir. 1970); *McHenry v. United States,* 420 F.2d 927, 928 (10th Cir. 1970); *United States ex rel. Long*

the Ninth Circuit have suggested as much.[6] It is also the central holding of *California v. Green*, 199 U.S. 149, 153, 158 (1970).

That a defendant fails to cross-examine because the codefendant denies making the statement and hence believes that cross-examination would be fruitless—apparently the rationale behind the Ninth Circuit's conclusion that there could be no "meaningful" cross-examination—does not render the witness unavailable for cross-examination. *United States v. Sims*, 430 F.2d 1089, 1091 (6th Cir. 1970); see *United States v. Insana*, 423 F.2d 1165, 1168 (2d Cir. 1970); *cf. California v. Green*, 399 U.S. 149, 158-59 (1970). When he denies making the statement, the codefendant actually diminishes its impact. See *California v. Green, supra*, at 159. Thus the proper resolution of the question now before this Court is found in *United States v. Sims, supra*, and *Baker v. Wainwright*, 422

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v. Pate, 418 F.2d 1028, 1030 (7th Cir. 1970); *Hawkins v. United States*, 417 F.2d 1271, 1273 (5th Cir. 1969) cert. denied, 397 U.S. 914 (1970); *James v. United States*, 416 F.2d 467, 475 (5th Cir. 1969); *United States v. Hoffa*, 402 F.2d 380, 387 (7th Cir. 1968), *vacated on other grounds sub nom. Giordano v. United States*, 394 U.S. 310 (1969).

Cases which support respondent's position, together with subsequent cases casting doubt upon their continued vitality, are discussed in footnote 4, *supra*, at pp. 20-21.

[6] *Mendez v. United States*, 429 F.2d 124, 128 (9th Cir. 1970); see *Ignacio v. Guam*, 413 F.2d 513, 515 (9th Cir. 1969); *Parker v. United States*, 404 F.2d 1193, 1196-97 (9th Cir. 1968); *Rios-Ramirez v. United States*, 403 F.2d 1016, 1017 (9th Cir. 1968); *Santoro v. United States*, 402 F.2d 920, 922-23 (9th Cir. 1968).

Two other Ninth Circuit cases are neutral: *Byrd v. Comstock*, 430 F.2d 937, 938 (9th Cir. 1970); *United States v. Eide*, 427 F.2d 543, 544 (9th Cir. 1970). No *Bruton* error was found in *Eide* because the codefendant confirmed the statement in substance, nor in *Byrd*, because the codefendant admitted part of the statement.

F.2d 145, 147-48 (5th Cir. 1970). Insofar as the majority opinion below holds that O'Neil was denied the right of confrontation, it is wrong.

II

ANY POSSIBLE ERROR IN ADMITTING RUNNELS' CONFESSION WAS HARMLESS.

There are at least two reasons why the admission of the codefendant's statement was harmless. The first of these is that the type of situation arising in O'Neil's case does not even give rise to error of constitutional dimension. As long as the declarant (here Runnels) is available for cross-examination, then even the use of his statement as substantive evidence against his codefendant is not constitutional error. *California v. Green*, 399 U.S. 149, 153-64 (1970). O'Neil got even better than that, for the evidence was admitted only against Runnels (RT 102; App. at 137).

Secondly, under *Harrington v. California*, 395 U.S. 250 (1969), *Bruton* error may be considered harmless where the evidence presented by the prosecution was overwhelming. Even if the disavowal of his confession by respondent's codefendant and respondent's failure to cross-examine his codefendant were considered *Bruton* error, since the evidence was overwhelming, and the confessions did not have a devastating impact upon respondent's defense, any error was harmless.

Bruton error is "harmful" error only if the codefendant's confession has a devastating impact upon the non-confessing defendant's defense. In *Bruton v. United States*, 391 U.S. 123, 135 (1968), this Court observed that under some circumstances a jury could be expected to follow limiting instructions, while in others:

> "[1] the risk that the jury will not, or cannot, follow instructions is so great, and [2] the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored."

In *Bruton*, if the codefendant's confession were excluded, Bruton's involvement in the crime rested solely upon the testimony of a single witness whose identification could not be supported through the testimony of the only other eyewitness. Since neither defendant offered a defense, the codefendant's confession obviously had a vital effect upon the case. The necessity of a devastating impact before *Bruton* error can be held harmful has also been suggested by several lower courts which have applied the rule[7] and appears to be the conclusion of this Court in *Dutton v. Evans*, ... U.S. ....., ..., 91 S.Ct. 210, 219 (1970).

In *Harrington v. California*, 395 U.S. 250, 254 (1969), the *Bruton* error was found harmless because

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[7]Cases finding no "vital impact" include: *Wapnick v. United States*, 406 F.2d 741, 742-43 (2d Cir. 1969); *United States v. Levinson*, 405 F.2d 971, 988 (6th Cir. 1968); see *United States v. Carlson*, 423 F.2d 431, 437-38 (9th Cir. 1970); *Santoro v. United States*, 402 F.2d 920, 923 (9th Cir. 1968). Cases finding a "devastating effect" include: *United States ex rel. LaBelle v. Mancusi*, 404 F.2d 690 (2d Cir. 1968); *United States v. Jones*, 402 F.2d 851 (2d Cir. 1968).

"the case against Harrington was so overwhelming that we conclude that this violation of *Bruton* was harmless beyond a reasonable doubt. . . ." This Court therein noted that one of the confessing codefendants who implicated Harrington testified and was cross-examined. *Id.* at 253. Other witnesses "testified he had a gun and was an active participant." *Ibid.* Furthermore, "the case against Harrington was not woven from circumstantial evidence." *Id.* at 254. Even though the implicating confessions of two codefendants who did not testify were erroneously admitted, "*apart from them* the case against Harrington was . . . overwhelming. . . ." *Ibid.* (Emphasis added.) This Court thus held that *Bruton* error was harmless if overwhelming evidence apart from that erroneous under *Bruton* had been offered at trial.

The majority below concluded that Runnels' confession was "harmful" to the defense because "some doubt was raised about the victim's identifications," "the alibi witnesses stuck to their stories," and "the remarkable agreement between Runnel's [sic] out-of-court statement and the victim's testimony is very persuasive; the statement offers a plausible explanation of the defendant's motives and actions before, during and after the robbery." *O'Neil v. Nelson, supra,* at 322-23 (App. at 118). The appropriate inquiry, however, is not whether the confession may have had *any* effect upon the trial, see *Harrington v. California,* 395 U.S. 250, 254 (1969), but whether it had a "devastating impact" upon the defense because of its content, the nature of the defense, and the state of the prosecution's evidence absent that confession,

see *Dutton v. Evans,* ..... U.S. ....., ..., 91 S.Ct. 210, 219 (1970).

Under the facts of this case, the Runnels' confession could not have had any significant effect upon O'Neil's defense for a number of reasons:

(1) Absent Runnels' confession, the evidence was overwhelming. The victim, a percipient witness, positively identified O'Neil and Runnels as the two men who robbed him and stole his car, threatening him with a silver-plated pistol. O'Neil and Runnels were found driving the victim's car, and O'Neil was seen throwing a silver-plated pistol away.

(2) The confession did not have a devastating impact upon O'Neil's defense since:

(a) It was merely descriptive, and did not attempt to shift the blame to O'Neil. Compare *United States ex rel. LaBelle v. Mancusi,* 404 F. 2d 690 (2d Cir. 1968).[8]

(b) It was not the only substantial evidence connecting O'Neil to the crime. Compare *Bruton v. United States,* 391 U.S. 123, 127-28 (1968) (which must be read in light of the facts set out in 375 F.2d 355, 357); *United States v. Jones,* 402 F.2d 851 (2d Cir. 1968).

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[8]The majority opinion states, "Runnels' purported statement . . . gives considerable credit to O'Neil for masterminding and directing the day's work." *O'Neil v. Nelson, supra,* at 320 (App. at 112). The only support for such a conclusion to be found in Runnels' confession is where he states, "O'Neil asked him if he wanted to make a couple of hits," and "O'Neil had the gun . . . [and] went up to the driver . . . ." (RT 103; App. at 137-38.) In every other case, Runnels said "they" did this or that. The quoted passages can hardly be characterized as crediting O'Neil with "masterminding and directing."

(c) O'Neil had the opportunity to cross-examine Runnels, but declined to do so. See *Parker v. United States*, 404 F.2d 1193, 1196-97 (9th Cir. 1968); *United States v. Catino*, 403 F.2d 491, 496 (2d Cir. 1968).

(d) Runnels actually took the stand, denying having confessed and repudiating the contents of the confession by testimony contrary thereto. *Baker v. Wainright*, 422 F.2d 145, n.9 at 148 and accompanying text (5th Cir. 1970); see *California v. Green*, 399 U.S. 149, 159 (1970).

(e) Runnels' testimony at trial fully supported O'Neil's defense. See *United States v. Panepinto*, 430 F.2d 613, 617 (3d Cir. 1970).

(3) Limiting instructions were given. See *Harrington v. California*, 395 U.S. 250 (1969); *cf. United States v. Sims*, 430 F.2d 1089, 1091 (6th Cir. 1970).

Insofar as the majority opinion concludes that any error was "harmful," it is erroneous.

III

FAILURE TO ADHERE TO THE EXHAUSTION DOCTRINE UNDERMINES FEDERAL-STATE RELATIONSHIPS AND UNDULY BURDENS FEDERAL COURTS.

As the majority opinion notes, *O'Neil v. Nelson, supra*, at 323 (App. at 119), "the *Bruton* question was never presented to the state courts for the very good reason that *Bruton* had not been decided when

O'Neil filed his federal petition." Under previous decisions of the Ninth Circuit, a federal habeas petitioner is required to exhaust state remedies made available by the announcement of new constitutional standards before he applies to the federal courts for relief. *Ashley v. California,* 397 F.2d 270, 271 (9th Cir. 1968); *United States ex rel. Walker v. Fogliani,* 343 F.2d 43, 46-48 (9th Cir. 1965); *Blair v. California,* 340 F.2d 741, 744 (9th Cir. 1965).

Some court must assess the "*Bruton* error" in light of the trial record, and determine whether in view of the evidence at trial, and the nature and content of the confession, the admission of the confession was harmless. This task should initially be left to the state courts, which have shown their willingness to examine *Bruton* claims, see, *e.g., In re Whitehorn,* 1 Cal.3d 504, 506, 509, 82 Cal.Rptr. 609, 611-12 (1969), both in the interests of comity and to reduce the burdens upon the federal courts; these being the purposes of Title 28 United States Code, section 2254(b). As this Court only recently noted in *California v. Green,* 399 U.S. 149, 168-70 (1970), a harmless-error question is more appropriately resolved by the state court in the first instance. Insofar as the majority below concludes that it was proper for the district court to pass upon the *Bruton* claim without referring the petitioner to the state courts, the majority opinion errs.

CONCLUSION

As a result of the majority opinion below, which cannot be reconciled with *Green,* the sixth amendment right of confrontation has been contorted beyond recognition, the *Bruton* rule carried past the pale of logic, and *Harrington* has suffered serious erosion. Furthermore, delicate federal-state relations are subjected to unnecessary strain while the federal judiciary shoulders an even greater share of the burden of collateral review. For these reasons, we respectfully urge that the judgment below be reversed.

Dated, San Francisco, California,
January 28, 1971.

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